89-956

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MURLAND W. SEARIGHT AND
VIRGINIA SEARIGHT,
Petitioners,

V.

MICHAEL CIMINO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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November 20, 1989

QUESTIONS PRESENTED

1. Whether the petitioners were denied Due Process under the Fifth and Fourteenth Amendments to the United States Constitution when the state district court divested them of a real property right after the cause of action had been extinguished by operation of law.

2. Whether the court below could decline to notice lack of subject matter jurisdiction when irregularly brought to its attention and which was also apparent on the face of the record at the time of judgment, and thereafter invoke the principle of res judicata to bar a direct attack on the judgment for want of subject matter jurisdiction.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MURLAND W. SEARIGHT
and VIRGINIA SEARIGHT,
Petitioners,

v.

MICHAEL CIMINO, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF MONTANA

The Petitioners, Murland W. Searight and Virginia Searight respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Montana entered in this

proceeding on July 19, 1989.

OPINION BELOW

The opinion of the Supreme Court of Montana appears in Appendix A hereto. Searight v. Cimino, ____ Mont. ____, 46 St. Rep. 1217, 777 P.2d 335 (1989).

JURISDICTION

The judgment of the Supreme Court of Montana was entered on July 19, 1989. A timely petition for rehearing was denied on August 25, 1989, (Appendix H), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

STATUTORY PROVISIONS INVOLVED

Rule 12(h)(3), M.R.Civ.P.: Whenever it appears by suggestion of the parties or otherwise that the court lacks

jurisdiction of the subject matter, the court shall dismiss the action. (This provision is identical to Rule 12(h)(3), Fed. R. Civ. P.).

Rule 60(b)(4), M.R.Civ.P.: On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (4) the judgment is void. (This provision is identical to Rule 60(b)(4), Fed. R. Civ. P.)

Relevant portions of the following constitutional and statutory provisions are set forth in Appendix C: U.S. Const., Amend V; U.S. Const., Sec. 1, Amend XIV; Rule 70, M.R.Civ.P.

STATEMENT OF THE CASE

A. Original Complaint and Judgment

On December 31, 1979, Petitioners/Plaintiffs (hereinafter Searights) agreed to sell to Respondent/Defendant (hereinafter Mr. Cimino) a parcel of real property pursuant to the terms of a Contract for Deed. Paragraph 14C of that Contract is quoted here in pertinent part. "Purchaser agrees that if Sellers do construct such airstrip, . . he will contribute fifty (50) percent of the cost." See Appendix G for complete text of 14C.

The Searights constructed an airstrip and when Mr. Cimino refused to pay his share, Mr. Searight filed a complaint on December 31, 1981, in the

District Court of the Eleventh Judicial District, Flathead County, Montana (hereinafter the district court) to enforce the terms of the Contract. This cause of action was designated as Cause No. DV-81-780. Final judgment (Appendix B) was rendered in the Searights' favor on May 14, 1985. Mr. Cimino appealed and the Montana Supreme Court affirmed. Searight v. Cimino, 221 Mont. 277, 718 P.2d 652, (1986). Judgment was satisfied on June 28, 1986.

The foregoing is for necessary background only. No portion of the proceedings through June 28, 1986, is in dispute here.

B. Post-Judgment Motion and Order

On July 29, 1986, Mr. Cimino resurrected Cause DV-81-780 by Motion to

Cause Plaintiffs to Execute an Airport Easement pursuant to Rule 70, M.R.Civ.P. (Appendix C). Rule 70 is identical to the federal rule (Appendix F) and provides for the enforcement of judgments. Notwithstanding that the judgment contained no reference or mention of an easement and the judgment had already been rendered, appealed, affirmed and satisfied, the district court ordered the Searights to prepare and deliver an easement to Mr. Cimino. Mr. Searight complied with the court's order and requested a hearing on the remaining issue of sanctions. Following a bench trial, the court denied the motion for sanctions against Mr. Cimino and on its own motion, imposed sanctions against the Searights. (Appendix D).

Mr. Searight appealed the decision to the Montana Supreme Court, which affirmed. Searight v. Cimino, 45 St. Rep. 46, 748 P.2d 948 (1988). On January 20, 1988 Mr. Searight filed a Petition for Rehearing, and for the first time directly called to the attention of the Court the want of jurisdiction of the lower court to act in this matter. The issue was not framed as a formal motion and the Court made no ruling on the issue. The Court denied a rehearing and the case was remanded to the district court.

C. Motion to Vacate

On March 10, 1989, (Appendix E), the Searights moved the district court to vacate judgment pursuant to its authority under Rules 12(h)(3) and 60(b)(4)

M.R.Civ.P., posing the issue, "Did this court violate the Searights' constitutional rights by ordering the Searights to convey an easement?". On March 24, 1989 the district court summarily denied the motion to vacate.

Mr. Searight appealed and raised the Federal Question by asking "Did the District Court, by ordering appellants to convey an easement to Defendant deprive appellants of property without Due Process in violation of the United States and Montana Constitutions?". The Montana Supreme Court affirmed the decision of the district court, but declined to address the constitutional question, on the basis that res judicata barred a jurisdictional challenge. Searight v. Cimino, 46 St.

Rep. 1217, 777 P.2d 335 (1989) (Appendix A). On August 25, 1989, the court denied a petition for rehearing. It is from this judgment that the Searights appeal.

REASON FOR GRANTING THE WRIT

I. THE OPINION BELOW IGNORED THE ISSUE OF LACK OF SUBJECT MATTER JURISDICTION, WHICH JURISDICTION IS AN ESSENTIAL ELEMENT OF FEDERAL DUE PROCESS OF LAW, AND DIRECTLY CONFLICTS WITH EVERY OTHER STATE COURT OF LAST RESORT AND FEDERAL COURT OF APPEALS AND APPLICABLE DECISIONS OF THIS COURT.

The Montana Supreme Court's opinion in this case signals a radical departure from its previous rulings on the fundamental requirement that a court must possess subject matter jurisdiction in order to render a valid judgment. The

opinion is contrary not only to its own legal antecedents, none of which were overruled, but on the facts of this case is in direct conflict with the decisions of virtually every other jurisdiction, state and federal, including the United States Supreme Court.

The arguments to follow can be summarized very simply. The order divesting the Searights of their real property interests was made after the court had lost jurisdiction to do so. In so acting, the court deprived the Searights of their fundamental right to due process under the U.S. Constitution, jurisdiction being an essential element thereof. The district court's and the Montana Supreme Court's subsequent failure to notice the lack of

jurisdiction apparent on the face of the record, either sua sponte or upon direct attack, cannot pass constitutional muster.

The central fact driving every other consideration here is that after Cause DV-81-780 (Searight v. Cimino lawsuit for breach of contract with judgment in favor of Searight) had been tried, finally decided, appealed, affirmed and satisfied, that cause of action expired. This Court has repeatedly held that final judgment puts an end to the cause of action, which cannot be brought into litigation between the parties upon any ground whatever. See, e.g., Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

More specifically, Montana law has held without exception that after judgment is satisfied, all the court's functions have been performed and it has no further jurisdiction for any purpose. See, e.g., State ex. rel. Taylor v. Carey, 74 Mont. 39, 42 (1925); State ex. rel McHatton v. District Court, 55 Mont. 324, 325 (1918); State v. Fowler, 59 Mont. 346, 357 (1921); Schmidt v. Colonial Terrace Associates, 223 Mont. 8, 11 (1986). Of course, the principle is universal and is not peculiar to Montana.

The fundamental requirements of due process at law applicable to this case were long ago set forth by the United States Supreme Court as exemplified by the following landmark cases and their many progeny. "[N]otice of hearing . . .

together with a legally competent tribunal having jurisdiction over the case constitute basic elements of the constitutional requirements of due process of law." Powell v. Alabama, 287 U.S. 45, 68 (1932). "No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party." Scott v. McNeal, 154 U.S. 34, 46 (1894). "To give such proceedings any validity, there must be a tribunal competent by its constitution - that is, by the law of its creation - to pass upon the subject matter of the suit." Pennoyer v. Neff, 95 U.S. 714, 733 (1878). And, Riverside and Dan River Cotton Mills, Inc. v. Menefee, 237 U.S. 189, 196 (1915) stated that when the court acts without

jurisdiction, it is an abortive exercise of judicial power repugnant to the Fourteenth Amendment.

It remains only to inquire why the district court and the Montana Supreme Court declined to notice want of jurisdiction.

As early as March 6, 1987, Searights' memorandum to the district court briefed the lower court on the recent holding in the case of Schmidt v. Colonial Terrace Associates, 223 Mont. 8 (1986), the facts of which were nearly identical to the case then before the court. Schmidt had raised a post-judgment motion that was outside the pleadings. The Schmidt court ruled that it did not have continuing jurisdiction and sanctioned the movant.

Although Mr. Searight's argument was directed toward the issue of Rule 11 sanctions, the issue of continuing subject matter jurisdiction was irregularly but directly brought to the attention of the lower court. Montana law requires that jurisdictional questions be disposed of by the court, "no matter how irregularly called to its attention. "O'Donnell v. City of Butte, 72 Mont. 449, 457 (1925). The court took no notice of the lack of subject matter jurisdiction and on its own motion, imposed sanctions of Mr. Searight. (Appendix D).

Following the district court's adverse ruling and the Montana Supreme Court's affirmance, Mr. Searight petitioned for rehearing and offered the

following argument in pertinent part, "The above considerations become moot if the district court lacked jurisdiction over the subject matter of the controversy." Searight supported his contention by the same arguments presented here, specifically citing Rule 12(h)(3), State v. Fowler, State ex rel. Taylor v. Carey, and Schmidt v. Colonial Terrace Associates, supra, concluding that "[T]he facts and law of this case are identical to Schmidt, supra, and the proceedings below must be set aside."

When the Searights first directly argued want of subject matter jurisdiction above, the matter was not formally presented as a motion calling for a ruling, and obviously the Montana Supreme Court did not take it as such.

Such a motion to dismiss is not required, as explained more fully below.

The O'Donnell court stated the rule of law as follows, in pertinent part: "No motion to dismiss upon this ground was made * * * but notwithstanding the failure of the defendants to raise this objection in the regular way, we consider it necessary to decide it, for the reason that it is, as above stated, jurisdictional in its nature." Id., citing People v. Oakland Water Front Co., 118 Cal 234, 50 P. 305 (1892). However, the Court simply denied the petition for rehearing without comment. There was no indication that it had considered, much less decided, the jurisdictional defect.

Subsequently, Mr. Searight directly attacked the validity of the judgment by

moving the district court to declare all proceedings after satisfaction of judgment as void ab initio under the provisions of Rules 12(h)(3) and 60(b)(4), M.R.Civ.P. Mr. Searight briefed the court in detail, essentially using the same arguments presented here, again citing the above Montana cases that divested the court of jurisdiction after final judgment. As had the Montana Supreme Court before it, the district court summarily denied Mr. Searight's motion without comment.

In full accord with Rules 12(h)(3) and 60(b)(4), M.R.Civ.P., and the rule set forth in Larrivee v. Morigeau, 184 Mont. 187 (1979), Mr. Searight appealed that denial. The Larrivee court ruled:

> An attack on subject matter jurisdiction may be raised at any

> time. Since we find in this case that the question of subject matter jurisdiction was not precisely ruled upon by the court in its order denying the first motions, the appeal taken by Morigeau from the order denying the motion of August 22, 1978 to vacate and dismiss for lack of subject matter jurisdiction is properly before us for consideration. Id., at 192.

This time, Mr. Searight's appeal was in part expressly based on the federal question of the protection of due process under the 5th and 14th Amendments of the U.S. Constitution. Again, the Montana Supreme Court affirmed, this time expressly refusing to consider the lack of jurisdiction so apparent on the record. (Appendix A, pages 11a-13a).

It is difficult to discern the Montana Supreme Court's rationale from the opinion below. On one hand, the Montana Supreme Court concedes that the

Searights raised the absence of an enforceable judgment at trial and the lack of jurisdiction on petition for rehearing on appeal, but fails to explain why either court refused to notice lack of jurisdiction when raised. Inexplicably, the Court describes subject matter jurisdiction as an issue that had already been decided but does not say when, where, by whom or even what that decision was. Rather, the record reveals that every time the matter surfaced, directly or indirectly, both the trial court and the appellate court took extraordinary pains to avoid the issue without deciding it.

On the other hand, the court found the precedent of Wellman v. Wellman, 198 Mont. 42 (1982), to be controlling. The

Court applied the Wellman rationale to this case to allow res judicata to bar a jurisdictional challenge on the basis that Mr. Searight had not taken the opportunity to raise the jurisdictional issue when Mr. Cimino first filed his motion. Apparently, the Montana Supreme Court holds here that subject matter jurisdiction is waived if not pleaded at the first opportunity. This is not the law. "[A] party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject matter jurisdiction on its own motion" Insurance Corporation of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 703 (1982).

In any case, Wellman is fully distinguishable both on the facts and on the law and cannot be controlling here. Wellman involved a default judgment entered in a quiet title action in favor of Plaintiffs. The Defendants moved to set aside the judgment on grounds of mistake, inadvertence, or excusable neglect, pursuant to Rule 60(b)(1), M.R.Civ.P. The motion was denied.

Ten years later Defendants filed a new quiet title action, claiming that the previous judgment was void for lack of jurisdiction. The court ruled that jurisdiction had been proper and dismissed the complaint, stating that Defendants were attempting to attack the old judgment by collateral issues that had been finally determined over ten

years ago.

In Wellman, there a second quiet title action was initiated to collaterally attack the first and relitigate issues already decided. Here, there is a single cause of action with a final judgment that has been satisfied and not thereafter disputed on any grounds, including jurisdiction. Here, Cimino managed to litigate completely new issues by post-judgment motion which even the Montana Supreme Court concedes were outside the scope of the original pleadings: (Appendix A-7): ". . . Even if the relief sought by Mr. Cimino was beyond the scope of the pleadings in the first proceeding, . . .) emp. supp.

Where Wellman had originally sought to set aside the judgment by a Rule 60(b)

motion and later collaterally attacked the judgment in a new action by another Rule 60(b) motion, the Searights here directly attacked not the valid final judgment, but rather the post-judgment motion by Cimino to resurrect the cause of action on completely new grounds. The attack is made directly pursuant to Rules 12(h)(3) and 60(b)(4), M.R.Civ.P., the first such motions to appear in this case.

The Montana Supreme Court in affirming Wellman invoked res judicata to bar a second Rule 60(b) motion to set aside a judgment. The Court adopted the reasoning of two Maine cases, both based on findings that res judicata barred successive Rule 60(b) motions to set aside judgment. See, Royal Coachman

Color Guard v. Marine Trading, 398 A.2d 382 (Me. 1979); Willette v. Umhoeffer, 268 A.2d 617 (Me. 1970).

Neither of the Maine cases, nor Wellman, purported to bar vacation of a void judgment when a direct attack on its validity was first placed by motion before the trial court in the original cause of action, as here. Neither Maine, nor any other jurisdiction citing the Maine cases extended the ruling to bar an initial Rule 60(b) motion. Montana itself ruled directly opposite to Wellman as recently as last year in Geiger v. Pierce, 45 St. Rep. 1257, 758 P.2d 279 (1988). For other contra post-Wellman Montana cases, see Schmidt v. Colonial Terrace Associates, 223 Mont. 8 (1986) and In re Marriage of Lance, 41 St. Rep.

2032, 2034, 690 P.2d 979, 981 (1984).

In closing this discussion of Wellman, this Court is respectfully invited to notice two recent U.S. Court of Appeals decisions that totally reject the rationale of Wellman and its included Maine cases: Watts v. Pinckney, (9th Cir. 1985), 752 F.2d 406 and Page v. Schweiker, (3d Cir. 1986), 786 F.2d 150. The Watts court ruled that an attack on judgment under Rule 60(b)(4) was a direct attack, not a collateral attack, and was not barred by res judicata.

The Page court found that where Schweiker had ample opportunity to raise the issue of subject matter jurisdiction in the underlying action, even denial of relief under a Rule 60(b)(1) motion on appeal did not foreclose raising a Rule

60(b)(4) motion in the court below. In fact, the court reasoned that sound judicial policy dictated that route. The Page court concluded that affirming a judgment not within the judicial power of the court would be as serious a usurpation as issuing such an order in the first place.

The res judicata doctrine is clearly inappropriate to bar an initial challenge to the validity of a judgment where the jurisdictional issue has been neither litigated nor decided. It is readily conceded that had either the district court or the Montana Supreme Court considered and decided the question of subject matter jurisdiction, even incorrectly, the ruling would have become the law of the case unless overturned on

appeal, but the record discloses no such consideration or decision. It is further conceded that this Court has upheld the doctrine of res judicata to bar a later collateral attack on jurisdictional grounds under very special circumstances, most notably in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940). There, this Court held that where original jurisdiction was based on a federal statute, a later finding that the statute was unconstitutional would not act retroactively to render the judgment void upon collateral attack.

This doctrine, however, has never been applied where the record, at the time the judgment was made, disclosed lack of subject matter jurisdiction. This follows the century of law set forth

in Pennoyer v. Neff, 95 U.S. at 728, which held that a judgment void when rendered will always remain void, and that the validity of every judgment depends upon the jurisdiction of the court before which it is rendered, not upon what may occur subsequently. Every other court that has confronted this questions is in accord with Pennoyer that a judgment rendered without jurisdiction is not merely voidable - it is void! Indeed, Montana strongly endorsed this specific principle as recently as 1977, in Matter of Adoption of Hall, 173 Mont. 142, 144.

As this Court more recently stated in Shaffer v. Heitner, 433 U.S. 186, 198-99 (1977), "From our perspective, the importance of Pennoyer is not in its

result, but the fact that its principles and corollaries derived from them became the basic elements of the constitutional doctrine governing state court jurisdiction."

Ultimately however, not even the alleged defect in the time and manner of the Searights raising the jurisdictional challenge can rule here, for Cimino's motion itself references the rendition and satisfaction of final judgment that divested the district court of any further jurisdiction. (Appendix C). In addition, the record before the court at the time it accepted the motion contained both judgment and satisfaction of judgment, neither of which mentioned an easement. (Appendix B). This fact imposed an obligation upon the court

quite independent of Mr. Searight's actions, as set forth below:

> "And if the record disloses that the lower court was without jurisdiction this court will notice the defect although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not on the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." United States v. Corrick, 289 U.S. 435, 440 (1936). This obligation to notice defects in a court of appeals' subject matter jurisdiction assumes a special importance when a constitutional question is presented.

Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986). (Emphasis added).

The Bender Court went on to discuss in some detail the "basic principles" of appellate courts, applicable here, citing such compelling authorities as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803),

and the following: "Every federal appellate court has the special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower court in a cause under review, even though the parties are prepared to concede it" Bender, at 541 citing Mitchell v. Maurer, 293 U.S. 237 (1934). And finally,

> [T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the

> court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

Bender, at 546, 547 citing Mansfield C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884). Cases in accord omitted.

The strength of the language in this recent opinion, based on such firmly established authority as Marbury, Mitchell and Mansfield makes it clear that the duty of the court is absolute and nondiscretionary. Lack of subject matter jurisdiction which is apparent on the fact of the record cannot be waived or ignored as a mere technicality, especially when the court purports to exercise its authority to divest a

citizen of his property. The findings of Bender, standing alone, are sufficient to support reversal of the opinion below by per curiam order.

There are so many federal courts of appeals decisions in conflict with the opinion below that the task lies only in selecting those that are most on point with the facts of the present petition. Page v. Schweiker and Watts v. Pinkney were discussed above as rejecting the Wellman rationale; other representative examples follow:

1. Lack of subject matter jurisdiction is not waivable and must be raised by the court on its own motion, Rule 12(h)(3). Mayer Paving and Asphalt Co. v. General Dynamics Corp., (7th Cir. 1973), 486 F.2d 763, 771. See also,

Eagerton v. Valuations, Inc., (11th Cir. 1983), 698 F.2d 1115, 1118.

2. Where the question of subject matter jurisdiction is not raised in the proper way, the court must nevertheless decide the question. Jones v. Brush, (9th Cir. 1974), 143 F.2d 733, 734.

3. In Cook v. Arentzen, (4th Cir. 1978), 582 F.2d 870, 872, the question of subject matter jurisdiction was formally raised, as here, for the first time on a petition for rehearing. The court re-heard the case and vacated judgment.

4. A court is required to notice lack of jurisdiction whether or not it is raised by the parties. Jablonski v. United States, (9th Cir. 1983), 712 F.2d 391, 394-95.

5. Where there is no subject

matter jurisdiction, there is, as well, no discretion to ignore that lack of jurisdiction. Joyce v. United States, (3d Cir. 1973), 474 F.2d 215, 219.

6. Rule 12 dismissals for lack of jurisdiction are nondiscretionary and are to be entered whether the parties object or not. International Video Corp. v. Ampex Corp., (9th Cir. 1973), 484 F.2d 634, 636.

7. A court may dismiss for lack of subject matter jurisdiction if such lack appears on the fact of the complaint and is obviously not curable. Harmon v. Superior Court of California, (9th Cir. 1962), 307 F.2d 796, 779.

8. In Collins v. Foreman 2d Cir. 1984), 729 F.2d 108, 111 the Court noted that in their constitutional challenge,

appellants asserted that the magistrate lacked subject matter jurisdiction in the underlying case, and because that kind of jurisdictional claim could arguably render the judgment void they could press their constitutional claim on collateral attack.

9. In Textile Banking Co., Inc. v. Rentschler, (7th Cir. 1981), 657 F.2d 844, 851 the Court found that a motion to vacate judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial judge unless the court was powerless to enter the judgment in the first instance. That Court cited the rule of law that if the underlying judgment was void because the court lacked subject matter jurisdiction or because the entry of the order violated

the due process rights of the respondent, the trial judge had no discretion and must grant appropriate Rule 60(b) relief.

In summary, exhaustive research reveals at least hundreds of opinions supporting the rules of law set forth above. The same exhaustive research finds no case where a court refused to consider a Rule 60(b) challenge offered for the first time where the issue of subject matter jurisdiction had not been previously litigated and decided. It may be fairly said that decisions of the federal courts of appeals in every circuit conflict directly with the opinion below.

The same may be said for the opinions of other state courts of last resort. Petitioner need not canvas all

fifty states to illustrate the point, for the principles are universal and repeat those covered above. For the sake of completeness, but in an effort to avoid redundancy, petitioner offers three illustrative opinions of state courts of last resort that are directly contra to the Montana Supreme Court's affirmance of an invalid judgment:

1. "The general rule is that a judgment that is void cannot be cured by subsequent proceedings. An appeal from a judgment entered by a court having no jurisdiction of the subject matter confers no jurisdiction on the appellate court." Nesbitt v. City of Albuquerque, (N.M. 1977) 575 P.2d 1340, 1344.

2. "[A] judgment which a court has no jurisdiction to render is void and

the affirmance thereof does not operate to give it force or validity." O. C. Whitaker, Inc. v. Dillingham, (Okla. 1944) 152 P.2d 371, 373.

3. "The validity of a judgment is determined as of the date of its rendition and if void, it remains so forever." Wiles v. Wiles, (Oreg. 1957) 315 P.2d 131, 134.

To fully grasp the significance of the opinion being appealed and its probable consequences, it is useful to examine Geiger v. Pierce, 45 St. Rep. 1257, 758 P.2d 279 (1988), keeping in mind that Montana decided Geiger six years after Wellman.

There, as here, Pierce moved to have a judgment vacated for lack of subject matter jurisdiction. There, as

here, the district court denied the motion and Pierce appealed. There, as here, opposing counsel contended that failure to raise the defense earlier barred it later.

The Montana Supreme Court cited the governing law which stated that,

> "It is a fundamental axiom of our legal system that the issue of subject matter jurisdiction may be invoked at any time in the course of a proceeding . . . . Furthermore, once the issue is raised and a court determines that there is a lack of subject matter jurisdiction, it can take no further action in the case other than to dismiss it. Rule 12(h)(3), M.R.Civ.P." (Citations omitted).

Geiger, 758 P.2d at 281. The Court held that failure to raise the matter of subject matter jurisdiction earlier was not fatal to her claim and reversed the judgment below. However, Justice Weber, joined by three other Justices, wrote a

specially concurring opinion expressing in the strongest terms his frustration in dealing with post-judgment jurisdictional attacks.

He conceded that federal case law required dismissal for jurisdictional reasons, but focused his objections not toward lack of jurisdiction generally, but on the underlying reason: Pierce's Indian tribal membership. There existed at least the implication that Pierce enjoyed some preferential jurisdictional shield and if she had been a non-Indian, the results would have been different.

A year later, Justice Weber gave full effect to his Geiger opinions by authoring the opinion under appeal, completely reversing the findings on essentially the same facts. According to

his two opinions, while the law required dismissal in Pierce's case, want of subject matter jurisdiction need not even be considered in the present case. This anamoly cannot be reconciled with the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

In summary, if certiorari is denied and the present opinion is permitted to become stare decisis in Montana, not only are the district courts and the Montana Supreme Court excused, sua sponte, from noticing want of jurisdiction apparent on the face of the record, they may refuse to notice it even when counsel brings it to their attention. Thereafter, even a direct attack is barred on the res judicata theory that it could have been raised at some undefined earlier

opportunity. Rules 12(h)(3) and 60(b)(4) M.R.Civ.P., are effectively emasculated. This opinion undermines the very foundations of the judicial process, setting aside the constitutional principles established by such authority as Marbury v. Madison and Pennoyer v. Neff, Supra.

Lest the emphasis on this radical departure from existing law be missed, the Montana Supreme Court underscored it by holding, notwithstanding its Geiger decision a year earlier, that the present appeal was so utterly without legal merit that the Court would impose sanctions against the Searights for even raising the question. The same arguments and most of the same authorities presented here were presented to that court.

The language of the opinion below clearly reveals the Court's hostility toward Mr. Searight's persistence in asserting a legal defense that it and the court below had pointedly ignored, and it emphasized the point by its harsh sanctions. The Montana Supreme Court has issued an unmistakable warning that it need no longer entertain Rule 12 or Rule 60 challenges to the validity of a court's actions if the issue was not raised at the outset of the litigation, and that such a defense will be raised at counsel's peril.

Lastly, this Court is requested to consider the consequences of the opinion below in another context: In Geiger v. Pierce and Larrivee v. Morigeau, Supra, the state district court rendered

judgments on matters within the exclusive jurisdiction of tribal courts. Both were vacated upon post-judgment challenges for lack of subject matters within the exclusive jurisdiction of tribal courts. Both were vacated upon post-judgment challenges for lack of subject matter jurisdiction which had not been previously raised. One needs only to ask, "Would this Court permit the rationale of the opinion below serve to bar jurisdictional challenges there?" Although the reason for the want of jurisdiction is different here, the results must be the same.

Because of the fundamental role that jurisdiction plays in the constitutional principle of due process of law, and because the opinion below

departs from the decisions of virtually every other state and federal jurisdiction, including this Court, that opinion must not stand.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Montana Supreme Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 89-192

IN THE SUPREME COURT
OF THE STATE OF MONTANA

1989

MURLAND W. SEARIGHT and
VIRGINIA M. SEARIGHT,

Plaintiffs and Appellant,

-vs-

MICHAEL CIMINO,

Defendant and Respondent.

APPEAL FROM: District Court of the Eleventh Judicial District, In and for the County of Flathead, The Honorable Leif Erickson, Judge presiding.

Submitted on Briefs: June 8, 1989

Decided: July 19, 1989

Filed: July 19, 1989

(Cited as 46 St. Rep. 1217, 777 P.2d 335).

Mr. Justice Fred J. Weber delivered the Opinion of the Court.

The Searights appeal from an order of the District Court of the Eleventh Judicial District, Flathead County, denying their motion to vacate judgment and impose sanctions against the defendant, Mr. Cimino. We affirm the District Court's denial of the motion, and further assess damages against the appellants pursuant to Rule 32, M.R.App.P., for the filing of an appeal without substantial or reasonable grounds.

The Searights present several issues for our review but we find it necessary only to address the issue of whether the District Court properly denied Appellants' motion to vacate

judgment and impose sanctions. Because we answer this question affirmatively, we will not discuss the remaining issues raised by Appellants.

This case has a lengthy history. The Searights initiated a cause of action against Mr. Cimino in 1981, seeking to enforce the terms of a contract for deed requiring Mr. Cimino to pay half the cost of an airstrip constructed on the Searights' land. On May 14, 1985, judgment was entered in favor of the Searights, and on appeal, this court affirmed. Searight v. Cimino (1986), 718 P.2d 652, 43 St. Rep. 810.

Mr. Cimino then sought to enforce the terms of the contract for deed granting him the right to use the airstrip. In July of 1986, he filed a

motion to cause appellants to execute an airport easement pursuant to Rule 70, M.R.Civ.P., which provides in relevant part:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.

The Searights resisted the defendant's motion, arguing that the previous judgment entered did not contain any reference to an easement which could be enforced by invoking Rule 70, M.R.Civ.P. The Searights acknowledged defendant's right to use the airstrip as set forth in the contract for deed, but argued that the granting of an easement

was not contemplated either by the contract or by the District Court's judgment so that defendant's motion should be dismissed. The Searights also requested sanctions against Mr. Cimino under Rule 11, M.R.Civ.P.

The District Court held a hearing on the motion to cause the execution of the easement, and ruled that a written easement needed to be prepared and recorded. Following a later hearing on the Searights' motion for sanctions, the District Court found that an easement had been prepared and recorded by the Searights' attorney. The court further found that the motion for sanctions "appears to be harassment on Mr. Searight's part." The court denied sanctions against Mr. Cimino, and on its

own motion, imposed sanctions against the Searights of $100.

The Searights then filed a motion to alter or amend the judgment, arguing that Rule 70, M.R.Civ.P., was inappropriate to enforce a judgment granting an easement that never existed. The District Court denied the motion, reasoning that:

> The thrust of Plaintiffs' argument is to relitigate the issue of easement. Since Plaintiffs have already signed and recorded the easement the point is moot.

On appeal, this Court refused to disturb the actions of the parties in putting the easement on record. Searight v. Cimino, (Mont. 1988), 748 P.2d 948, 45 St. Rep. 46. This conclusion was reached based upon the absence of a record of the hearing on Mr. Cimino's motion to require

execution of an easement, and the absence of proof whether the parties were simply told to work it out. This Court also affirmed the levying of sanctions against the Searights, but refused to award damages for a frivolous appeal under Rule 32, M.R.App.P. 748 P.2d at 952.

On March 10, 1989, after appointing himself as counsel, Mr. Searight filed a motion to vacate judgment and impose sanctions in the District Court. The Motion requested that the court, pursuant to its authority under Rules 12(h)(3) M.R.Civ.P., and Rule 60(b)(4), M.R.Civ.P., vacate all orders, decrees, and judgments entered in the action arising from Mr. Cimino's motion to cause appellants to execute an airport easement. Mr. Searight contended that

the District court lost subject matter jurisdiction of the case after entry and satisfaction of its final judgment in the first action and had no power to order the granting of an easement. Mr. Searight also requested that sanctions be imposed against Mr. Cimino pursuant to rule 11, M.R.Civ.P. The District Court summarily denied the motion. It is from this denial that the Searights appeal.

I

Did the District Court properly deny appellants' motion to vacate judgment and impose sanctions?

Appellants contend that the District Court was without subject matter jurisdiction to hear and determine the easement issue because final judgment had been rendered in the prior decision and

that judgment included no reference to an easement which could have been enforced under Rule 70, M.R.Civ.P.

Appellants argue that all orders and judgments rendered as to the easement issue must be vacated, citing Crawford v. Pierse, (1919), 56 Mont. 371, 375-76, 185 P. 315, 317-18.

> It is elementary that when the judgment roll upon its face shows the court was without jurisdiction to render a particular judgment, its pronouncement is in fact no judgment. It cannot be enforced. No right can be derived from it. All proceedings founded upon it are invalid and ineffective for any purpose. . . . An affirmance of such a judgment on appeal cannot make it valid. (Citations omitted).

In response, Mr. Cimino argues that appellants are merely attempting to relitigate the easement issue, and that because they have already had the

opportunity to raise a jurisdictional challenge, the doctrine of res judicata applies to preclude further litigation of this matter, citing Wellman v. Wellman, (1982), 198 Mont. 42, 643 P.2d 573:

> Once there has been a full opportunity to present an issue for judicial decision in a given proceeding, including those issues that pertain to a court's jurisdiction, the determination of the court in that proceeding must be accorded finality as to all issues raised or which fairly could have been raised, else judgments might be attacked piecemeal and without end. (Emphasis supplied).

643 P.2d at 575, citing Royal Coach Color Guard v. Marine Trading, (Me. 1979), 398 A.2d 382, 384.

Contrary to appellants' contention that Wellman is distinguishable, we conclude that it controls. In Wellman, appellants attempted to attack a judgment rendered ten years prior to the appeal,

contending that the District Court exceeded its jurisdiction by granting more relief than was sought in the pleadings. In affirming the lower courts dismissal, this Court said:

> Plaintiffs had a full opportunity to litigate the voidness issue in 1971 when they first moved to set aside the default judgment. They failed to do so. The doctrine of res judicata is founded upon the generally recognized public policy that there must be some end to litigation. The end for the plaintiffs in this case occurred more than ten years ago when they failed to raise the issue of jurisdiction and the District Court denied their first motion to set aside the default judgment.

643 P.2d at 575-576.

In the present case, appellants had the same opportunity to raise the voidness issue when Mr. Cimino first filed his motion to cause execution of the airport easement. They did in fact

object to the District Court's ability to enforce an easement under Rule 70, M.R.Civ.P., in their motion to alter or amend judgment following the disposition of the easement issue. They further raised the specific issue of lack of subject matter jurisdiction in their Petition for Rehearing after this Court's opinion in the matter. Because the substance of the appellants' challenge to the District Court's actions has remained the same, it is apparent that they are merely attempting to relitigate issues which have already been decided by invoking different labels by which to contest the proceedings, one of which is subject matter jurisdiction. We will not allow appellants' characterization of their claim to hinder application of the

doctrine of res judicata, and the prevention of protracted litigation.

Furthermore, the District Court's handling of the easement issue was compelled by the actions of the appellants themselves. While it is not clear from the record whether the District Court ordered an easement by granted or told the parties to "work it out," the District Court's findings indicate that appellants were uncooperative and that Mr. Cimino's attorney was left with three alternatives:

(a) to do nothing and have this matter continue indefinitely without resolution;

(b) to breach the Code of Professional Responsibility and

communicate directly with Mr. Searight, or;

(c) to seek relief through the court.

The District Court found that Mr. Cimino's attorney chose the only alternative that was reasonably available to him, namely, to file a motion asking the court to compel an easement be drawn and recorded.

Even if the relief sought by Mr. Cimino was beyond the scope of the pleadings in the first proceeding, we hold that a jurisdictional challenge to the court's actions will nevertheless be barred by the doctrine of res judicata under this Court's holding in Wellman. We affirm the District Court's order denying appellants' motion to vacate and

impose sanctions. Because we conclude that this appeal is taken without substantial or reasonable grounds and that appellants are merely attempting to relitigate the easement issue, we impose damages in the amount of $500 pursuant to Rule 32, M.R.App.P.

Affirmed.

/s/ Fred J. Weber, Justice

TURNAGE, C. J., and HUNT, SHEEHY and McDONOUGH, J.J., concur.

APPENDIX B

IN THE JUDICIAL COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

MURLAND W. SEARIGHT and VIRGINIA SEARIGHT,	)	
Plaintiffs,	)	No. DV-81-780
-vs-	)	JUDGMENT
MICHAEL CIMINO,	)	
Defendant.	)	

On May 4, 1985, the above Court duly made and filed its Findings of Fact and Conclusions of Law herein, directing that Judgment be entered in favor of Plaintiffs and against Defendant;

IT IS ORDERED, ADJUDGED AND DECREED that judgments be, and is hereby, entered in favor of Plaintiffs against Defendant;

IT IS FURTHER ORDERED, ADJUDGED AND

DECREED that Plaintiffs be awarded Judgment against Defendant in the amount of NINE THOUSAND TWO HUNDRED FORTY-SEVEN AND NO/100 DOLLARS ($9,247.00), plus interest at the legal rate from the date of Judgment and costs in the amount of $33.00, for a total judgment of $9,280.00.

DATED this 14th day of May, 1985.

/s/ J. M. Salansky
District Judge

APPENDIX C

IN THE JUDICIAL COURT OF THE
ELEVENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR
THE COUNTY OF FLATHEAD

MURLAND W. SEARIGHT and VIRGINIA SEARIGHT,	)	No. DV-81-780
Plaintiffs,	)	MOTION TO CAUSE PLAINTIFFS TO EXECUTE AN AIRPORT EASEMENT AND NOTICE OF MOTION
-vs-	)	
MICHAEL CIMINO,	)	
Defendant.	)	

COMES NOW Defendant Michael Cimino, by and through his undersigned counsel, and moves the Court, pursuant to its authority under Rule 70, M.R.Civ.P., to cause the Plaintiffs to execute an easement to their airport, a copy of the same being attached hereto and by this reference made a part hereof, and if they fail to do so, that the Court shall

appoint some other person to execute the easement under its authority granted by said Rule 70. This motion is made on the grounds and for the reasons that the Defendant tendered the payment of the money judgment in satisfaction of the Court and requested that the check not be signed until the easement was signed and returned. The Response of the Plaintiffs is set forth in Mr. Searight's letter of June 12, 1986, a copy of which is attached hereto and by this reference made a part hereof, and the same has no merit.

DATED this 29th day of July, 1986.

/s/James C. Bartlett

APPENDIX D

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

MURLAND W. SEARIGHT and VIRGINIA M. SEARIGHT, Plaintiffs, -vs- MICHAEL CIMINO, Defendant.	No. DV-81-780 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter having come before the Court under the Plaintiffs' motion for sanctions under Rule 11 M.R.Civ.P., Murland Searight and James C. Bartlett having testified, and the Court being fully informed in the premises, enters its findings of fact, conclusions of law and order as follows:

FINDINGS OF FACT

1. That the plaintiff, Murland Searight, has given contradictory statements in regard to providing a written easement for the airport located on his real property. He has stated that an easement was there for the asking, but he has indicated in writing that he would only give a personal license. The Defendant sent to Plaintiffs' attorney an easement for review and signature of the Plaintiffs. The easement was delivered with a letter dated June 5, 1986. On June 12, 1986, Mr. Searight wrote John Bothe, sending a carbon copy to Mr. Bartlett, stating that he had received the check given in satisfaction of judgment, but he was not happy with the amount of money. Nonetheless, a Satisfaction of Judgment was signed by

Mr. Bothe on June 28, 1986. The letter to Mr. Bothe also expressed Mr. Searight's disagreement with the easement that had been prepared by Mr. Bartlett and set forth his position that "the right is personal to Mr. Cimino and does not run to his legal and personal representatives, heirs and assigns, tenants, servants, visitors and licensees." He had other disagreements, including the position that the Contract for Deed did not "contemplate the granting of an easement at all. If he is not content with the rights assured in the contract, I am willing to execute a separate irrevocable license embodying the language of the Contract for Deed."

2. After Mr. Bartlett received a copy of the correspondence from Mr.

Searight to Mr. Bothe, he communicated with Mr. Bothe. He was not privileged under the Code of Professional Responsibility to communicate directly with Mr. Searight.

3. Mr. Searight did not have Mr. Bothe prepare any written document, license or easement or otherwise, in response to Mr. Bartlett's request for an easement.

4. Mr. Bartlett learned from Mr. Bothe that there were disagreements brewing between attorney and client and that nothing would be forthcoming from Mr. Searight which could be recorded with the Flathead County Clerk and Recorder.

5. Mr. Bartlett then had three alternatives: (a) to do nothing and have this matter continue indefinitely without

resolution; (b) to breach the Code of Professional Responsibility and communicate directly with Mr. Searight; or (c) to seek relief through the Court. Mr. Bartlett chose the only alternative that was reasonably available to him, namely, to file a motion asking the Court to compel an easement to be drawn and recorded.

6. Mr. Searight changed attorneys. No written easement satisfactory to Mr. Searight was ever tendered or offered prior to the Court hearing.

7. The Court held a hearing on the motion and ruled in favor of Mr. Bartlett's position, namely, that a written easement needed to be prepared and recorded.

8. In response to the Court's

directive, Mr. Springer prepared an easement, and after some minor changes, the same was signed by Plaintiffs and was recorded. The written easement is not a license, but it is a document that runs with the land and is binding on the Plaintiffs and is for the benefit of Mr. Cimino, his heirs, legal and personal representatives and assigns. Mr. Cimino now has a written easement which he can assign and convey at the time he may sell his real property.

9. But for the motion by Mr. Bartlett to have this final loose end of the litigation resolved, nothing would have occurred.

10. Mr. Searight testified that all Mr. Bartlett needed to do was ask for an easement that was consistent with the

terms of the Contract for Deed and it would be given. Mr. Bartlett did ask for an easement from Mr. Bothe, and none was tendered back to him. Mr. Bothe indicated that none would be forthcoming.

11. The Motion for Sanctions under Rule 11, M.R.Civ.P., submitted by the Plaintiff and Mr. Springer is not well taken, and in fact, it appears to be harassment on Mr. Searight's part. There was no need for this hearing. Mr. Searight, as a law student, and Mr. Springer, as a licensed attorney, knew the difference between a license and an easement. Mr. Bartlett attached to his motion Mr. Searight's letter to Mr. Bothe indicating that no easement would be given but only a personal license. Since both gentlemen know the difference

between these legal documents, and since this Court had previously found that an easement was warranted, the Motion for Sanctions under Rule 11 should never have been brought.

12. The Court, on its own motion, has discretion to impose sanctions against the Plaintiff because of the waste of the Court's time and the waste of Mr. Bartlett's time, and does so by awarding to Mr. Bartlett a money judgment against Mr. and Mrs. Searight in the sum of $100.00.

CONCLUSIONS OF LAW

1. Rule 11, M.R.Civ.P., provides that the signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge,

information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for improper purpose, such as harassment or to cause unnecessary delay or needless increase in cost of litigation.

2. Mr. Bartlett made a request for a written easement to be signed by the Searights and be placed of record. He was told by Mr. Searight's attorney that none would be forthcoming. He had received a copy of a letter that Mr. Searight had written to Mr. Bothe stating that no easement was warranted and that he was only willing to give a personal license.

3. Since Mr. Searight's attorney indicated that no written documentation was going to be forthcoming and Mr. Bartlett was precluded from corresponding directly with Mr. Searight, his only alternative was to file the motion disclosing all facts. The issue was then brought to the Court's attention and the Court ruled that an easement was required, as opposed to a license.

4. An easement was eventually signed by Plaintiffs. This matter should have been concluded at that time.

5. In fact, it is the Motion made by the Plaintiffs under Rule 11, M.R.Civ.P., that is done for an improper purpose--to harass and cause unnecessary delay and needless increase in cost of litigation.

6. Mr. Bartlett had to appear at the hearing. Mr. Bothe was not called as a witness. The correspondence from Mr. Searight to Mr. Bothe was only produced at the request of defense counsel. An attorney reading Mr. Searight's letter would immediately know the distinction between an easement and a license and that a controversy existed that needed immediate attention by the Court.

7. Pursuant to Rule 11, M.R.Civ.P., the Court, on its own motion, may impose sanctions when it deems fit, and sanctions are warranted to be imposed against Mr. and Mrs. Searight.

ORDER

IT IS HEREBY ORDERED:

1. That Plaintiffs' Motion for Sanctions against Michael Cimino and

James C. Bartlett is hereby DENIED.

2. That the Court, on its own motion, imposes sanctions in favor of James C. Bartlett and against the Plaintiffs in the sum of $100.00.

DATED this 12th day of March, 1987.

/s/Lief B. Erickson, District Judge

APPENDIX E

IN THE JUDICIAL COURT OF THE
ELEVENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE
COUNTY OF FLATHEAD

MURLAND W. SEARIGHT and VIRGINIA SEARIGHT,	)	No. DV-81-780
Plaintiffs,	)	AMENDED MOTION TO VACATE JUDGMENT AND IMPOSE SANCTIONS
-vs-	)	
MICHAEL CIMINO,	)	
Defendant.	)	

COMES NOW Plaintiffs Murland W. Searight and Virginia Searight, by and through their undersigned counsel, and move the Court, pursuant to its authority under Rules 60(B)(4) and 12(h)(3), M.R.Civ.P., to vacate as void ab initio all orders, decrees and judgments in this cause of action arising from Defendants MOTION TO CAUSE DEFENDANTS TO EXECUTE AN

AIRPORT EASEMENT dated July 29, 1986. This motion is made on the grounds and for the reasons that this Court lost all jurisdiction over the subject matter when its final judgment in this cause was satisfied on June 26, 1986, and said motion did not and could not properly invoke this Court's jurisdiction.

Plaintiffs further move this Court, pursuant to its authority under Rule 11, M.R.Civ.P., to impose sanctions on Defendant and his attorney on the grounds and for the reasons that Defendant's MOTION to enforce a non-existent judgment in a cause over which the Court had no jurisdiction is not well grounded in fact, warranted by existing law or a good faith argument for extension, modification or reversal of existing law,

thereby needlessly delaying and increasing the cost of litigation.

This motion is identical to the original motion of March 10, 1989 with the exception of citing the Court's authority under Rule 60(b)(4). The parties and issue are the same and Plaintiffs' brief of said motion dated March 10, 1989, is respectfully submitted to the court in support of the amended motion.

DATED this 22nd day of March, 1989.

/s/Murland W. Searight

APPENDIX F

FIFTH AMENDMENT,
UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SECTION 1, FOURTEENTH AMENDMENT,
UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 70, M.R.Civ.P.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to

comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court may order the clerk to issue a writ of attachment or sequestration against the property of the disobedient to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any

order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

APPENDIX G

PARAGRAPH 14C, CONTRACT FOR DEED

Sellers have plans to construct an air strip on the land in Section 7 lying West of the North Fork Road, commencing at approximately the Northwest corner of said Section. Purchaser agrees that if Sellers do construct such air strip, with approximate taxi ways, turnouts and parking areas, he will contribute fifty (50) percent of the cost, his share not to exceed $15,000.00 toward such construction costs which sum may be added to the balance at that time due on this Contract. In consideration of such payment Purchaser shall be entitled to the free use of said air strip so long as it is in existence, which right shall continue so long as Sellers own said

property and Sellers shall secure said right to Purchaser in the event they sell the property on which the airstrip is constructed. If Sellers do not complete construction of said air strip by January 1, 1984, this provision shall be null and void.

APPENDIX H

No. 89-192

IN THE SUPREME COURT
OF THE STATE OF MONTANA

MURLAND W. SEARIGHT and VIRGINIA M. SEARIGHT,	)	
Plaintiffs and Appellant,	)	ORDER
-vs-	)	
MICHAEL CIMINO,	)	
Defendant and Respondent.	)	

The petition for rehearing is denied.

DATED this 25th day of August, 1989.

/s/ J. A. Turnage,
Chief Justice

/s/ Fred J. Weber
/s/ John Sheehy
/s/ William Hunt
/s/ R. McDonough
Justices